No. 80-1537

APR 8 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

PITTSTON STEVEDORING CORP.,

Petitioner,

—against—

JACK A. DOCA and FANNIE C. DOCA,
MARINA MERCANTE NICARAGUENSE, S.A.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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The Questions Presented

The questions presented are predicated on the following facts:

Plaintiff, a checker, was employed by Hamilton which supervised, directed and controlled plaintiff in his work, he was on their payroll, and they paid his salary, hired and had the right to fire him, provided him with Workmen's Compensation benefits, and at the time of the accident sent him on board ship to perform certain checking work in Pittston's work area.

Pittston had a stevedoring contract with shipowner to perform the work of loading and unloading cargo and a terminal service agreement to perform clerking and checking work. Pittston sub-contracted the clerking and checking work to Hamilton and performed only the work of loading and unloading cargo. Pittston's supervisor joined Hamilton in sending plaintiff on board ship to their work area to perform checking work but not their work of loading and unloading cargo. Pittston did not direct or control plaintiff in his work and stipulated on trial that he was the employee of Hamilton.

Pittston's work area was in extremely dangerous condition with obstructions, traps and tripping hazards in the area which could not be avoided by plaintiff. They knew it was dangerous for them to work there and complained about the danger to the ship's crew but did not correct same. They did not inform Hamilton of the danger before they participated in sending plaintiff on board because Hamilton had nothing to do with the conditions on board the vessel. They did not correct the dangerous condition nor did they notify or warn plaintiff thereof. Plaintiff tripped and fell and was injured by reason thereof.

The Circuit Court stated plaintiff was a *business invitee* on board ship and Pittston had the duty to exercise reasonable care under the circumstances to furnish a safe place to work and to remove tripping hazards. Under the facts in the case the scope of Pittston's duties was the same as the scope of the duty owed to their employees and OSHA Regulations set the standard of care required of Pittston and the scope of their duty.

The questions presented are:

1. On the facts in this case in view of the duty to exercise reasonable care owed by Pittston to plaintiff and the scope of such duty being the same as that which runs to their employees, does Pittston cease being a third party and now become plaintiff's employer under the LHWCA and, therefore, under Section 905(a) cannot be sued as a third party by plaintiff?

2. If plaintiff is not an employee of Pittston for purposes of Section 905(a) of the LHWCA does Pittston nevertheless have a duty to provide plaintiff with a safe place to work and to act in a reasonable manner under the circumstances?

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Statement of the Case

1. *Facts*

Shipowner entered into contracts with Pittston, the Petitioner, who obligated themselves to perform stevedoring work of loading and unloading vessels and to perform work of clerking and checking cargo. Pittston sub-contracted its clerking and checking contract to Hamilton and retained only its loading and unloading work.

Pittston was the contractor and Hamilton Terminal was its sub-contractor. The parties were so designated in the Terminal Service Agreement. Plaintiff was employed by Hamilton as a checker and stowage clerk and in the course of the performance of his work was lawfully on the vessel. His work on the vessel was to go to the hatches where the

longshoremen were working, speak to the hatch boss and "check out" the cargo of pipe in the hatches as to type and destination. Unmarked pipe was found on the pier and it was to match up the pier cargo with the pipes already stowed in the hatches that necessitated his being on board ship and going to Hatch No. 4. It was necessary for him to look into the hatch.

Pittston knew he was going on board to go to their work area. He went on board at the request of a Hamilton supervisor joined in by a Pittston supervisor.

Pittston was working in Hatch No. 4 and necessarily used the top deck about same as both a means of going to and coming from the hatch. The deck was also a place of work since deckmen were required to work offshore when rigging up and resetting the booms to a different position over the hatch. Thus, Pittston, was an occupier of Hatch No. 4 and the deck about same.

Pittston's work area was dangerously obstructed with tripping hazards. Plaintiff tripped and fell sustaining very severe injuries.

2. *Pittston's Duty to Plaintiff*

Thus, Pittston had a special relationship with plaintiff. (Sec. 302, Restatement of Torts, Second). Hamilton was hired by Pittston to perform certain work and plaintiff was employed by Hamilton. Plaintiff became a business invitee of Pittston and was in their work area when he was injured.

Prosser, Law of Torts, 4th Edition, Ch. 10, § 61, pages 385, et. seq. states Pittston's duty as follows:

> "—those who enter premises upon business which concerns the occupier, and upon his invitation express or implied, the latter is under an affirmative duty to pro-

> tect them, not only against the dangers of which he knows, but also against those which with reasonable care he might discover." (385)

A typical example is "independent contractors doing work on premises and the workmen employed by such contractor as well as a large and miscellaneous group of similar persons who are present in the interest of the occupier as well as of their own." (386). The special obligation towards invitees "extends to the entrance to the property, and to a safe exit after the purpose is concluded; and it extends to all parts of the premises to which the purpose may reasonably be expected to take him, and to those which are so arranged as to lead him reasonably to think that they are open to him." (391-392)

The duty is to exercise reasonable care, but

> "—the obligation of reasonable care is a full one, applicable in all respects, and extending to everything that threatens the invitee with an unreasonable risk of harm. The occupier must not only use care not to injure the visitor by negligent activities, and warn him of latent dangers of which the occupier knows, but he must also inspect the premises to discover possible dangerous conditions of which he does not know, and take reasonable precautions to protect the invitee from dangers which are foreseeable from the arrangement or use." (393)

It should also be noted that under the common law a general contractor has the duty of providing a safe place to work, the duty being to both make the premises safe and to keep them safe. The premises are made safe by discovery of dangers ascertainable through reasonable diligence and remedying them or warning against them. They are kept safe by forebearance from creating new conditions of dan-

ger. The duty runs to all persons employed on the premises without regard to whether they are employees of the party in control or in possession. The duty is non-delegable. The duty owed to workmen is analogous to that owed to any business invitee and it is to make safe, by reasonable care, the places of work provided by him and the ways and approaches to such places to work. *Employer M.L.I. Co. of Wis.* v. *DiCesare & M.C.C. Corp.*, 194 N.Y.S.2d 103 (1959) 9 A.D.2d 379; *Wohlfron* v. *Brooklyn Edison Co., Inc.*, 238 App. Div. 463, 265 N.Y.S. 18 *aff'd*, 263 N.Y. 547; *Allen* v. *Cloutuer Const. Corp.*, 44 N.Y.S.2d 290 (1978); 405 N.Y.S. 2d 630.

Here, Pittston knew of the dangerous condition of the deck when they came to work and requested the ship to have the condition corrected. The request was made at about 9:00 A.M. The ship did not correct the condition before the accident at 2:30 P.M. and Pittston made no attempt to correct same either. Their own longshore employees had to come and go and perform their work on deck walking on top of the dangerous condition. They knew of the danger but did not tell anybody in Hamilton of the condition of the deck offshore side No. 3 and 4 hatches because "they had nothing to do with the ship so I didn't tell them."

Knowing of the extremely dangerous condition they invited plaintiff, or acting together with Hamilton's supervisor, sent plaintiff on board ship to their work area.

The fact that Pittston owes Doca the same duty and degree of care as it owes to its own employees does not make Doca its employee! A contractor has always been required to exercise the same degree of care and owes the same duty towards an employee of its sub-contractor as it must exercise towards its own employee. This is so both under the common law and in maritime law. The opinion

of the Circuit Court states that the plaintiff is in effect entitled to the same care and Pittston owes him the same duty as they owe to their own employees. It does *not* make a finding of fact that plaintiff is Pittston's employee.

The case of *Vanderlinden* v. *Lorentzen,* 139 F.2d 995 (2d Cir. 1944) is remarkably similar in fact to our case. A Checker, a stevedore, a shipowner, and an unsafe way were also involved. Plaintiff was a Checker in the employ of one who was a sub-contractor of the stevedore. Cargo was to be discharged from a lighter. To get to the lighter, stevedore's employees and business visitors were required to descend the ship's ladder which was defective. Plaintiff was injured while descending said ladder. Plaintiff sued both shipowner and the stevedore, his employer's contractor, for negligence. The Court stated:

> "We hold that both defendants were under a duty to use reasonable care to see that the plaintiff had a safe approach to the deck of the lighter and that the ladder was safe. Vanderlinden was a 'business visitor' of both because he went upon the lighter in the interest of both, and neither could devolve its duty to him upon the other, however much they might agree upon its final incidence as between themselves, or whether the law would do so without agreement." (996-997)

The OSHA Regulations set forth the standard of care required to be complied with for the benefit of the class of persons sought to be protected.

In *Lindler* v. *District of Columbia,* 502 F.2d 495 (C.C.D.C. 1974) (LHWCA case), a negligence action was brought against the defendant for injuries sustained by workmen who were employed by defendant's independent contractor. The Court stated "— — we hold that, as a matter of law the District may be held liable to its contractor's employees

who are injured in the performance of inherently dangerous work." (499) The Act must be construed liberally in favor of the injured employee and narrow statutory construction should *not* deprive the injured employee of either his compensation or his claim in damages against third parties. The statute was not designed to protect third parties from suit. The Court then held that where the District contracts for the performance of inherently dangerous work, it has a duty to guard against injuries to third persons which may result therefrom.

Furthermore, the objective of the Longshoremen's and Harbor Workers' Act and its amendments is to encourage safety aboard vessels. *Edmonds* v. *Compagnie Generale Transatlantique,* 443 U.S. 256 (1979). It was the intention of Congress that a set of regulations containing safety standards be set up which would constitute a standard of conduct required of employers. The responsibility for complying with the regulations is placed upon an "employer" as defined in 29 CPR Section 1918.3(c). The latter section states that "The term 'employer' means an employer of whose employees are employed in whole or in part in longshoring operations or related employments as defined herein." Section 1918.3(j) defines "related employments" and includes checkers. Section 1918.2(b) states that where a person (shipowner, operator, etc.) is *acting as employer,* he has the responsibility of complying with or the performing of duties required by the Safety Regulations.

Thus the employers and those acting as employers are charged with responsibility of complying with the regulations. The class of persons for whose benefit the Safety Regulations were promulgated were longshoremen and those in related occupations on board ship including checkers. Taking Congressional intent and the objective of the

Statute into consideration, plaintiff, a checker, employed by Pittston's sub-contractor performing related work in longshore operations, is one whose health and safety is sought to be protected by the Regulations.

Pittston's failure to comply with the standard of conduct required by the Safety Regulations is negligence. Having the duty to furnish and maintain a safe place to work and safe means of going to the place of work, Pittston is liable for damages that may result.

Pittston's claim that such violation of the Regulations cannot be the basis of stevedore's liability is erroneous. Such claim pre-supposes that there is no duty owing to plaintiff. This belief is not correct as set forth herein.

3. *The Opinion of the Circuit Court*

That fact that Pittston owes plaintiff the same duty and degree of care that it owes to its own employees does not make him its employee for the purposes of Workmen's Compensation benefits under 33 U.S.C. 901 et seq. The Circuit Court held substantially as hereinbefore set forth. It did find that Pittston hired Hamilton and plaintiff was Hamilton's employee. Pittston was required to keep their work area free of tripping or stumbling hazards (29 C.P.R. 1918.91[a]). Since "it continued working without making sure the deck was clean, it exposed itself to liability for violation of a statutorily established standard". (4a). The Court stated that because of the relationship *between Hamilton and Pittston,* and because of the participation of Pittston in having plaintiff go on board ship to its work area made Doca's relationship to Pittston "effectively that of an employee, *for purposes of the scope of the duty* based on the OSHA Regulations". (5a) (emphasis supplied)

Thus the Court held that Pittston owed a duty of care to the plaintiff. The Court also held that because of the

relationship between the parties and their acts, the *scope* of Pittston's duty was to be measured by the OSHA Regulations. Put another way, the Court held that the scope of the duty owed to plaintiff is the OSHA Regulations since his relationship to Pittston for such purposes was effectively the same as an employee.

The Court does *not* make a finding of fact that plaintiff is Pittston's employee nor did the Court make a finding that plaintiff was "in effect, a borrowed servant" (p. 4, Petition) as claimed by Pittston, but when Pittston states in its Petition (p. 8) that the Second Circuit "found as a fact, based on the District Court record, that Jack Doca was an employee of Pittston" that is not only a distortion but a misstatement made with the knowledge that it is not correct.

Petitioner furthermore knew that the Circuit Court did not view plaintiff as their employee since the opinion described plaintiff's position as that of a *business invitee.* (5a Petition).

It should also be noted that on the Petition for Rehearing in the Circuit Court briefs were requested of all parties and respondent took the very same position as set forth herein. The Circuit Court denied the Petition. Obviously respondents' interpretation of the meaning and import of the Court's opinion was correct.

Reasons for Denying the Petition for a Writ of Certiorari

The Petition here should be denied since it is based upon a false issue, misstatements of fact and law, distortion of the Second Circuit Court of Appeals opinion here, irrelevant citations and erroneous reporting of case holdings. It is a frivolous application and should not be countenanced.

Petitioner's only obvious objective is to delay payment of a judgment. The trial was held in January 1979; the Judge's opinion was filed July 11, 1979. To date there has been excessive delay and it is unfair to the plaintiff. Losses have been and are to be figured as of the date of trial. The amounts are to be discounted, in part, as of the date of trial. To continue delay here is to deprive plaintiff of due process.

1. *False Issue Raised by Petition*

Petitioner now argues that when an "OSHA employment nexus" is found, the injured plaintiff cannot sue the one violating OSHA Regulations since the violation determines when the exclusive remedy of Sec. 905(a) of the LHWCA becomes operative. Such inverted reasoning is hardly worthy of comment. It was the LHWCA which authorized issuance of the Safety & Health Regulations for longshoring (29 CFR 1918 et seq.) not the reverse.

Furthermore, Petitioner's statements that "it is clear" that respondent is an employee of Pittston as defined by both 29 U.S.C. § 652(b) (OSHA) as well as 33 U.S.C. Sec. 902(3) (LHWCA) is both not clear and not correct. The sections quoted in the Petition from 29 U.S.C. § 651 et seq. are irrelevant to maritime employment. 33 U.S.C. Sec. 902(3) does not make plaintiff an employee of Pittston under the Act compelling application of Sec. 905(a) to our law suit.

What such "nexus" actually is meant by is far from clear. Under Petitioner's theory, every general contractor is relieved of its responsibility for failure to exercise reasonable care. Any time a third party acts in a negligent manner which is contrary to the standards set up by the Safety & Health Regulations for Longshoring (29 C.F.R. 1918 et seq.), they cannot be sued for damages. They are relieved of liability if there is any relationship between

them as third party and the injury which gives rise to a duty to exercise care. Thus, the breach of the "duty" becomes the reason for being relieved of liability if the negligent act amounts to a violation of the standard of care set up in the Regulations.

It is submitted that Pittston violated its duty owed to plaintiff based on the facts in this case. In addition, the standard of care of the Safety Regulations was not adhered to by them.

The petition confuses the application and relevancy of OSHA 29 U.S.C. 651 et seq. and LHWCA 33 U.S.C. 901 et seq. as well as the Safety & Health Regulations for Longshoring, 29 C.F.R. 1918 et seq. The confusion which petitioner generates in this case is deliberate and the product of its own inconsistencies which is most difficult to follow. On trial, Petitioner took the position that plaintiff was an employee of Hamilton, not Pittston, and so stipulated. On appeal Pittston claimed that it had no duty owing to plaintiff to exercise reasonable care and no duty under the Safety Regulations because there was not an employer-employee relationship between them. Their Reply Brief on Appeal (p. 22) sets forth their view that the lower court's "confusion" was magnified by its failure to consider that *"Bachtel* v. *Mammoth Bulk Carriers Ltd.*, 605 F.2d 438 and the OSHA Regulations create and/or impose a duty and a standard of conduct that shipowner and stevedore alike must abide by."

Bachtel (9th Cir. 1979) analyzed the application of the OSHA Regulations in a negligence suit and concluded that the *Provenza* v. *American Export Lines, Inc.*, 324 F.2d 660 (4th Cir. 1963) and *Venable* v. *A/S Det. Forenede Dampskibselskab*, 399 F.2d 347 (4th Cir. 1968), decisions as well as the Opinion in *Reyes* v. *Vantage S.S. Co., Inc.*, 558 F.2d

238 (5 C.A. 1977) were good law. (445). See also *Johnson* v. *A/S Ivarans Rederi,* 613 F.2d 334 (1st Cir. 1980). (OSHA Regulations will continue to apply to all parties and may define the appropriate standard of care).

In *Reyes* v. *Vantage S.S. Co., Inc.,* 558 F.2d 238 (5 C.A. 1977), the Court pointed out that "the law is well established that violations of a statute which is intended to protect the class of persons to which a plaintiff belongs against the risk of the type of harm which has in fact occurred is negligence in itself." (242)

2. *The Non-Existent Conflict Between Circuits Under the Facts Presented*

The Circuit Court here did not apply Sec. 905(a) of 33 U.S.C. simply because it was not applicable nor relevant. The facts in evidence did not show respondent to be an employee of Pittston under the LHWCA so as to deprive him of his right to sue Pittston as a third party. Despite the foregoing, Petitioner finds the Second Circuit in our case to be in direct conflict with both the 5th and 8th Circuit Courts of Appeal. The four cases cited by them on page 5 of the Petition do not show any conflict as claimed and are irrelevant to Petitioner's false issue in this case.

In *Jeter* v. *St. Regis Paper Co.,* 507 F.2d 973 (5th Cir. 1975) relied upon by Petitioner, the defendant contracted as plaintiff's employer to paint a silo. The employer was an independent contractor and supplied its own equipment and employees. In the course of the use and handling of a scaffold plaintiff fell therefrom and was injured. Defendant did not control the physical conduct of the performance of the work nor did it reserve any right to do so. Under the Mississippi State compensation statute there was no duty of care on such facts running from the defendant to plaintiff, an employee of an independent con-

tractor. This was not a maritime case and reference therein was to OSHA 29 U.S.C. Sec. 651(b). On the facts in that case it was held that no duty arose in plaintiff's favor. This Section of the Act is not applicable to maritime employment and the fact situation is entirely different from that found in our case.

In *Thibodaux* v. *Atlantic Richfield Co.*, 580 F.2d 841 (5th Cir. 1978) cert den. 442 U.S. 909, 99 S.Ct. 2820, 60 L.Ed. 2d 274 (1979), plaintiff did not engage in maritime activity and so did not come under the LHWCA for compensation purposes. The Court commented that if he were so engaged then the question arises as to whether he is a "borrowed employee" of defendant. The Louisiana Workmen's Compensation Act provides for compensation as an exclusive remedy because the State Statute designated defendant as principal. What constituted a borrowed employee was not disclosed. A death action under General Maritime Law was permitted to proceed despite the exclusive remedy provision of the State Law.

Beaver v. *Jacuzzi Brothers, Inc.*, 454 F.2d 284 (8 Cir. 1972), a case cited as one in conflict with ours, predates *Marshal* v. *Knutson Construction Co.*, 566 F.2d 596 (8 Cir. 1977) and involves the interpretation of the Arkansas Workmen's Compensation Law. The Court found plaintiff to be an employee of a temporary employer "within the meaning of the Workmen's Compensation Act" and "the predicate for the finding was the right of control of the performance of the work of the temporary employee". (285).

More to the point and the issues involved here as viewed by the 5th and 8th Circuits are the following cases:

Reyes v. *Vantage S.S. Co., Inc.*, 558 F.2d 238 (5th Cir. 1977) which has been discussed hereinbefore. In that case,

Marshal v. *Knutson Construction Co.*, 566 F.2d 596 (8 Cir. 1977) is cited with approval. In the latter case the Circuit Court stated that a general contractor on a construction site will be held liable for violation of OSHA 29 U.S.C. Sec. 654(a)(2) even if the violation is that of one of its sub-contractors; that the general contractor is responsible under OSHA for violations of safety standards set forth in the Federal Regulations. The Circuit Court (8 Cir.) stated:

> "Furthermore, the duty of a general contractor is not limited to the protection of its own employees from safety hazards, but extends to the protection of all the employees engaged at the worksite. *Id.; Anning-Johnson Co., supra* at 24,784." (599)

The Court held that this is so even though OSHA states that each employer shall comply with occupational safety and health standards promulgated under the Act.

Obviously the 5th and 8th Circuits and the opinions cited by Petitioner are not in conflict with our case.

3. *Plaintiff Was Not Pittston's Special Employee*

Recognizing the probability that they are in error in claiming that Doca was found to be "in fact" an employee of Pittston, Petitioner now claims he was working under the control of Pittston and that he was a special or temporary employee of that company. They argue that, therefore, no action can be brought by plaintiff against them.

To achieve their desired result, Pittston treats their contract with Hamilton as meaningless; ignores stipulations in the action; treats the testimony of Pittston's officer (Chiarello) as merely stating a legal position not under oath to be walked away from with impunity.

The parties stipulated in this case that Doca was a checker and stowage clerk employed by Hamilton. The stevedoring work was performed by Pittston. The Secretary of Pittston, Chiarello, testified to the contract between his company and Hamilton and stated that they had two contracts with shipowner—one for loading and unloading of the vessel, and the other for terminal service, namely, clerking and checking cargo. Pittston sub-contracted the terminal-service agreement to Hamilton and on the day of the accident Pittston did the loading and discharging work and Hamilton performed the clerking and checking operation.

Doca testified that he was employed by Hamilton exclusively for over five years; when he went onto the ship he was working in the capacity of a stowage clerk for Hamilton; that he would go onto a ship only if he received such instructions from his superintendent (Hamilton) to check the stowage of cargo on board ship. The deckmen, foreman and hatch bosses on deck when the accident happened were not co-employees of his and they worked for Pittston. These were the people who were working on board ship loading the vessel.

The record amply shows that Doca was on Hamilton's payroll and he was paid by them. He received Workmen's Compensation from them. His job duties were not those of loading and unloading but those of a checker and stowage clerk. He did not receive any direction from Pittston, was not under their control, not on their payroll and never considered to be their employee.

By no stretch of the imagination could any reasonable person say plaintiff Doca was a special employee of Pittston.

4. *Misrepresentation of Cases in Petition*

Petitioner misstates the sense and import of various cases cited by them. For example:

Fallone v. *Misericordia Hospital, et al.*, 23 A.D.2d 222, 259 N.Y.S.2d 947, *aff'd*, 17 N.Y.2d 648, is cited for the proposition that where a borrowed servant relationship exists the employer cannot be sued. The facts in that case defeat Pittston's argument. In *Fallone*, plaintiff was an employee of a joint venture; was paid by the joint venture; was on the payroll for employees of the joint venture; Workmen's Compensation Insurance was procured by the joint venture and defendant, Industrial Engineering Co. was one of the companies comprising the joint venture. At the time of the accident and for several days prior thereto *plaintiff was working under the direction of the foreman of Industrial Engineering Co.* It was held that he was a special employee of Industrial because of such direction and under the circumstances could not sue that defendant.

Matter of DeNoyer v. *Cavanaugh*, 221 N.Y. 273. A sentence therefrom is quoted in the Petition. The Court was, however, not informed that the sentence following reads:

> "If the men are under the *exclusive control* of the special employer in the performance of work which is part of his business, they are, for the time being, his employees." (275)

Thus, that case calls for exclusive control by stevedore of Doca in the work of loading and discharging to have him designated as a special employee. That is not the case here.

Likewise, *The Standard Oil Company* v. *Anderson*, 212 U.S. 215 (1909) which is cited p. 4 Petition emphasizes that sole control and direction is a requisite for a finding of

borrowed servant. In our case there is neither control, direction or superintendence of plaintiff by Pittston.

Johnston v. *International Freighting Corporation,* 274 App. Div. 728, 87 N.Y.S.2d 297. Plaintiff was hired as a Harbor Master by one company and worked under their sole direction and direct supervision. He did no stevedoring work. The stevedore was held not liable to pay Workmen's Compensation as an employer.

It becomes fruitless and pointless to repeat all of the citations and claims advanced by Pittston to show the irrelevancy to the issue raised or their error. Suffice it to say that there are no facts in the record of this case showing plaintiff to have been working under the exclusive control or any direction or control of Pittston. Doca was not their employee in the sense that deprives him of his right to sue them as a third party.

CONCLUSION

There is no merit to Petitioner's claim and there is no legal or equitable reason to grant Pittston's Petition herein.

Respectfully submitted,

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